Anthony Motor Company, Inc. d/b/a Honda of Hayward *and* East Bay Automotive Council and its affiliated Local Unions: Machinists Automotive Trades District Lodge No. 190; East Bay Automotive Machinists Lodge 1546 (affiliated with the International Association of Machinists and Aerospace Workers, AFL–CIO); Auto, Marine and Speciality Painters Union, Local No. 1176, and Teamsters Automotive Employees Union, Local No. 78, AFL–CIO. Cases 32–CA–11174 and 32–CA–11395

April 29, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On July 24, 1991, Administrative Law Judge Clifford H. Anderson issued the attached decision. The Respondent and the General Counsel filed exceptions, supporting briefs, and answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

1. We agree with the judge, for the following reasons, that the Respondent violated Section 8(a)(5) of the Act by unilaterally setting initial terms and conditions of employment without prior notice or consultation with the Union. A successor employer is free to set unilaterally the initial terms and conditions of employment unless it is ''perfectly clear'' that the new employer plans to retain all of the precedessor's unit employees. *NLRB v. Burns Security Services*, 406 U.S. 272 (1972). We adopt the judge's finding that but for the Respondent's unlawful conduct it would have hired virtually all the predecessor's unit employees. *Fremont Ford*, 289 NLRB 1290 (1988). The Respondent's failure to hire the predecessor's employees resulted from its intention to avoid a bargaining obligation with the Union. Further to the extent that there is uncertainty with respect to what Respondent would have done absent its unlawful purpose, such uncertainty must be resolved against the Respondent, since it cannot be permitted to benefit from its unlawful conduct. *Love's Barbeque Restaurant No. 62*, 245 NLRB 78 (1979). Under these circumstances, we find that the Respondent was precluded from setting initial terms and conditions of employment without prior consultation and bargaining with the Union.

2. Respondent, in its exceptions to the 8(a)(5) conclusions, asserts that the employee-applicants cannot now be considered to constitute part of Respondent's work force since the parties had stipulated during the 10(j) proceeding before the district court that the employees had declined offers of reinstatement, thereby waiving their reinstatement rights. We find no merit in this contention.

On October 12, 1990, pursuant to the court order, the Respondent sent the employee-applicants a letter offering reinstatement. The letter stated that the offer was made pursuant to the court order. The letter further stated that, since the order was being appealed, the order could be ultimately dissolved. The letter also said that, if Respondent was successful at the NLRB hearings, the employer would not be required to retain them as employees.

Respondent's offer does not constitute an unconditional offer of reinstatement. Even assuming arguendo that Respondent could lawfully inform employees that they were subject to discharge in the event that it ultimately prevailed before the Board, the Respondent here went further. It informed the employees that they were subject to discharge if the 10(j) order were revised. Of course, the results of 10(j) litigation do not dictate the final adjudication of the case before the Board. In these circumstances, we believe that Respondent was not privileged to insert that condition into its offer.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Anthony Motor Company,

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The judge concludes, and we agree, that the General Counsel established a prima facie case that the Respondent's failure to hire the predecessor's employees was motivated by an unlawful desire to avoid becoming obligated to recognize and bargain with the Union. The judge finds, and we agree, that with the exception of employee James Fuller, the Respondent failed to meet its burden of demonstrating that it would have not hired the employee applicants even without the antiunion motives.

The judge made general findings that the service department employees were not scrutinized on merit and that the Respondent failed to show that these employees would not have been hired in any event. The judge, however, failed to specifically mention employee applicant Herman Troche, the service writer, in his discussion of the service department. The judge did find Herman Troche to be one of the discriminatees.

Batarse interviewed Troche in March along with most of the other employee applicants, and there is no testimony by Batarse as to why Troche was not hired. Parker Luciano, the Respondent's parts manager, testified that he told Batarse that it was common knowledge that Troche was planning to retire. There is, however, no evidence that Batarse relied on Luciano's comments. Under these circumstances we find, in agreement with the judge, that the Respondent has failed to meet its burden to show that Troche would not have been hired in any event.

Inc. d/b/a Honda of Hayward, Hayward, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Sharon Chabon, Esq., for the General Counsel.
Patrick W. Jordan, Esq. (Keck, Mahin & Cate), of San Francisco, California, for Respondent.
Burton F. Boltuch, Esq. (Boxer, Elkind & Gerson), of Oakland, California, and *David A. Rosenfeld, Esq. (Van Bourg, Weinberg, Roger & Rosenfeld)*, of San Francisco, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge. I heard this case in trial on January 16 and 17 and February 11, 12, and 13, 1991, in Oakland, California. Posthearing briefs were received from all parties on April 8, 1991. The matter arose as follows.

On June 5, 1990, the East Bay Automotive Council and its affiliated Local Unions: Machinists Automotive Trades District Lodge No. 190; East Bay Automotive Local 1546; Auto, Marine and Speciality Painters Union, Local No. 1176; and Teamsters Automotive Employees Union, Local No. 78 (the Union) filed a charge against Anthony Motor Company, Inc., d/b/a Honda of Hayward (Respondent) with Region 32 of the National Labor Relations Board docketed as Case 32–CA–11174. On July 17, 1990, the Regional Director for Region 32 issued a complaint and notice of hearing respecting that charge. Thereafter the Regional Director issued a correction to complaint on July 20, 1990, and an amendment to complaint on August 3, 1990. The Union filed a second charge against Respondent docketed as Case 32–CA–11395 on September 12, 1990. On October 22, 1990, the Regional Director issued a complaint and notice of hearing with respect to the latter charge and amended that complaint on October 30, 1990. The Regional Director issued an order consolidating cases on October 23, 1990, and a consolidated amended complaint on November 2, 1990.

The consolidated cases opened for hearing on November 13, 1990, before Administrative Law Judge Richard J. Boyce who received the formal papers and, pursuant to motion, adjourned the hearing to January 16, 1991. On January 7, 1991, Deputy Chief Administrative Law Judge Earldean V.S. Robbins issued an order transferring the proceedings to me. That order was not appealed by any party. Thereafter the hearing proceeded on January 16, 1991, in essence de novo before me without objection from any party.

The complaint, as amended, alleges in essence that Respondent acquired a Hayward, California new and used car dealership and selectively hired a limited portion of the predecessor auto dealership's parts and service employees in order to avoid becoming obligated to recognize and bargain with the predecessor's parts and service employees' representative for purposes of collective bargaining—the Union. The General Counsel contends that this selection process resulted in the failure to hire certain of the predecessor's parts and service employees in violation of Section 8(a)(3) and (1) of the National Labor Relations Act (the Act). The complaint further alleges that Respondent is a successor to the predecessor and was obligated to recognize and bargain with the Union as the exclusive representative of Respondent's parts and service employees. Respondent's failure and refusal to do so, as well as Respondent's establishment of initial terms and conditions of unit employees' employment and the changing of those conditions without bargaining with the Union, the complaint alleges, violates Section 8(a)(5) and (1) of the Act. Finally, the complaint alleges various acts by Respondent's agents violative of Section 8(a)(1) of the Act. Respondent's answer denies the commission of the alleged unfair labor practices.

All parties were given full opportunity to participate at the hearing, to introduce relevant evidence, to call, to examine and to cross-examine witnesses, to argue orally, and to file posthearing briefs.

Upon the entire record including helpful briefs from all parties, and from my observation of the witnesses and their demeanor, I make the following[1]

FINDINGS OF FACT

I. JURISDICTION

At all times material, Respondent has been a California corporation with an office and place of business in Hayward, California, where it has been engaged in the retail sale and servicing of automobiles. Respondents as part of its business operations-annually enjoys revenues in excess of $500,000 and annually purchases and receives goods or services from outside the State of California of a value in excess of $5000. Respondent is therefore an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

1. The former dealership

Jim Close Motors d/b/a House of Honda operated as a new automobile dealership selling and servicing Honda brand vehicles as well as used cars in Hayward, California, on real property owned by Close. The Union at relevant times to the cessation of the House of Honda's service operations represented the House of Honda employees in the following bargaining unit (unit):[2]

> All full-time and regular part-time employees employed in the Parts and Service Departments in the job classifications set forth in Article XVII of the ''Addendum Between the Greater East Bay New Car Dealers Association For And On Behalf of Southern Alameda County Dealers Association and East Bay Automotive Council,'' effective July 1, 1989 through June 30, 1993; ex-

[1] Where not otherwise noted, these findings herein are based on the pleadings, the stipulations of counsel, or unchallenged credible evidence.

[2] There is no dispute and I find that the unit described below is an appropriate unit for purposes of collective bargaining within the meaning of Sec. 9 of the Act with respect to both House of Honda and Respondent.

cluding all other employees, guards, and supervisors as defined in the Act, as amended.

House of Honda's general manager was Steve Saint, its service department manager was Don Sipple, and its parts department manager was Parker Luciano. Luciano was in the House of Honda bargaining unit. The following 13 employees were also in the House of Honda unit at the time of closure. Their department or function follows after their names:

Adrien Abbadie	Parts
Charles Bailey	Service
Vince Brown	Service
Clarence (Lance) Cabral	Parts
Dennis Clark	Detailer
James Fuller	Detailer/Parts
Harlow Hill	Service
Peter Staat	Service
Ted Staat	Service
Troy Staat	Service
Edward Tallman	Parts
Nathaniel Taylor	Detailer
Herman Troche	Service

As will be described in greater detail, infra, House of Honda discontinued operations on February 27, 1990, and all unit employees were terminated as of that date.

2. Respondent's commencement of operations

Rudy Batarse's family has long been successful in the operation of automobile dealerships in the San Francisco Bay Area. Batarse has also been involved in the industry for over 15 years and has extensive experience with the sale and servicing of Honda brand motor cars. Batarse entered into negotiations with Jim Close regarding possible acquisition of the House of Honda dealership in 1989. By February 1990 sale terms were agreed upon. On March 2, 1990, Batarse, through the corporation, Respondent herein, purchased the assets of House of Honda, leased the underlying real estate and prepared to commence operations doing business under the name Honda of Hayward.

In anticipation of commencement of Respondent's operations, Batarse hired Steve Saint as Respondent's sales manager and Parker Luciano as its parts department manager. Each was an admitted supervisor of Respondent as defined in Section 2(11) of the Act. Luciano was therefore not part of Respondent's bargaining unit.

In February 1990, Batarse advertised for unit applicants in local newspapers and arranged to interview House of Honda unit employees. Most initial interviews with House of Honda unit employees were conducted by Batarse on March 2 and the days following. Of the 13 House of Honda unit employees listed above, Respondent hired three: Vince Brown who started on March 12, Clarence (Lance) Cabral who started on March 5, and Dennis Clark who started on March 15. Respondent also interviewed non-House of Honda applicants for employment in March. The following individuals were hired from among those applicants in March. Their departments and dates of first employment follow their names:

Kent Frasier, Parts—March 14
Alex Hernandez, Parts—March 15
Bernd Koegler, Service—March 12
Dan Martin, Service—March 12
Paul Moore, Parts—March 12
John Rowley, Service—March 12
Richard Rigdon, Service—March 26
Steve Vaughn, Service—March 12

On April 4, 1990, Respondent hired new unit employee John Crawford as a detailer and on May 7, 1990, hired new unit employee Moises Villamar as a lot attendant.

Respondent set its own initial terms and conditions of employment for unit employees and did not follow the provisions of the collective-bargaining agreement between the Union and the House of Honda covering House of Honda unit employees.

3. Respondent's contacts with the Union

Bernie Tolentino at relevant times was the business representative for Local 1546 of the International Association of Machinists, a constituent member of the Union. His duties and responsibilities included representing the Union in dealings with House of Honda and Lloyd Wise—a dealership operated by Rudy Batarse's father and one in which Rudy Batarse held a responsible position. Tolentino testified that he learned of the possible sale of House of Honda in November 1989 and on various occasions attempted to discuss the matter with Rudy Batarse. In late November Tolentino came upon Rudy Batarse in a restaurant and was briefly told by Batarse that the sale had not yet been concluded but that Tolentino should not worry. Batarse continued, ''we've always had a good relationship. We need good help and we're not going to have any problems with the union.'' Rudy Batarse testified that the restaurant meeting occurred in January 1990. Batarse's version of this conversation did not include his giving the quoted assurances to Tolentino.

On December 21, 1989, Tolentino met with Rudy Batarse at Lloyd Wise and delivered two area or standard contracts to him. Again, in Tolentino's memory, Batarse told him that though the sale was not final there would be ''no problems with the Union.'' Batarse had no recollection of receiving the contracts at this particular time or assuring Tolentino there would be ''no problems.'' Tolentino testified he tried unsuccessfully to meet with Batarse in January both by phone and in a visit to the dealership. Rudy Batarse testified that Tolentino telephoned him in early March just after he had opened the facility and that he told Tolentino he was so busy he did not have time to sit down with him.

Tolentino met Rudy Batarse's father, Anthony Batarse, at a social event on May 9, 1990. Tolentino complained that he was having difficulty speaking to or meeting with Rudy Batarse. Anthony Batarse suggested that Rudy Batarse was desirous of an incentive plan for service employees. Tolentino told Anthony Batarse that the Union had contracts with incentive plans and told him he would get copies of such contracts to Rudy Batarse. The next day Tolentino hand delivered two such contracts to Rudy Batarse's secretary at Lloyd Wise Honda for his consideration.[3] Rudy Batarse acknowledged that he had received such contracts but did not

[3] The contracts did not provide for a ''flat rate system'' as described more fully, infra.

recall when or under what circumstances they had been received.

Tolentino and Rudy Batarse spoke by telephone soon thereafter. Each testified the other initiated the call. Tolentino sought recognition of the Union as representative of the unit employees and asked Batarse to sign a contract. Rudy Batarse declined to do so, suggesting the employees could make their own decision in a Government-conducted election. Respondent filed a representation petition seeking an election on May 16. The charges here followed.

4. Postinitial complaint events

After the initial complaint issued Respondent utilized the services of a private investigation firm. Its agent, James Campbell, and a retained management consultant, John Guay, each admitted agents of Respondent, contacted various potential witnesses respecting events.

In September 1990, the General Counsel obtained an injunction in the United States District Court for the Northern District of California under Section 10(j) of the Act directing Respondent, inter alia, to offer House of Honda job applicants employment, to apply the House of Honda collective-bargaining agreement terms and conditions of employment and to recognize and bargain with the Union. The General Counsel and Respondent subsequently stipulated to a modified order sought by Respondent in the court action allowing Respondent to cease bargaining with the Union and to reinstate the terms and conditions of employment it had initiated in March.

B. *Specific Complaint Allegations*

The consolidated amended complaint alleges various acts and conduct violative of Section 8(a)(1) of the Act. Basically the conduct alleged breaks into two gross categories: conduct arising in the job applicant interviews and startup process and conduct occurring in the postcomplaint contacts with potential witnesses. The complaint allegations of Section 8(a)(3) and (5) of the Act deal with Respondent's hiring process, the legal consequences of that process, and Respondent's conduct and obligations thereafter.

The 8(a)(1) and (3) allegations in this case turn primarily on questions of fact—particularly the resolution of conflicting versions of events and an evaluation of probabilities and demeanor. To render the resolution of the issues as intelligible as possible, it seems appropriate to present at least generally the conflicting testimony respecting specific allegations of the complaint, then to turn to the specific arguments of the parties and, finally, to analyze the matters in dispute, resolve factual conflicts and reach conclusions respecting the specific allegations of the complaint.

1. Allegations of independent violations of Section 8(a)(1) of the Act

Paragraphs 7 and 8 of the complaint allege independent violations of Section 8(a)(1) of the Act. The General Counsel on brief pages 29–32 identifies the specific testimony offered to support these paragraphs. The relevant testimony is summarized below.

a. *Against Rudy Batarse*

(1) Complaint paragraph 7(a)(i)—On March 3, 1990, interrogated applicants about their willingness to work for a nonunion shop

Edward Tallman, an employee of House of Honda in the parts department, submitted an application to Respondent along with other House of Honda employees and was scheduled for an interview with Batarse. Batarse and Tallman met alone on March 3.[4] Tallman testified that during the interview process, Batarse discussed with him the operation of the shop on a flat rate basis.[5] Tallman told Batarse that he had experience under a flat rate shop. Tallman testified that Batarse then asked him how he felt about a nonunion shop. Tallman answered that a nonunion shop ''can be fine'' and that ''if it was a matter of going nonunion, that was fine, I was all for it, because if it was a matter of keeping a job, I was all for it.'' Batarse denied asking Tallman about working in a nonunion shop.

Nathaniel Taylor had been many years with the House of Honda. He filled out an application for Respondent and was interviewed by Batarse on March 3. The two met alone. During the interview, in Taylor's recollection, Batarse asked him how he felt about working in a flat rate shop. Taylor indicated he was not familiar with such a system. Batarse explained and Taylor asked questions about how such a system would apply to his position as an auto detailer. Taylor testified he asked Batarse what he thought the Union was going to do about the flat rate in a union shop.[6] Taylor testified that Batarse ''asked me how I would feel about working in a nonunion shop.'' Taylor answered that he preferred union shops because of the value of someone ''to stand behind them'' if the company had it in for a particular employee. Batarse denied asking Taylor about his view of working in a nonunion shop.

Ted Staat was a 30-year employee with House of Honda. He interviewed with Batarse on March 2. Ted Staat described the interview as follows:

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[4] All dates refer to 1990 unless otherwise indicated.

[5] A ''flat rate'' system is a system of employee compensation based on specific time allotments and concomitant dollar payments for particular tasks accomplished. Thus a mechanic would be credited with a specific amount of time worked upon completing a particular task, for example replacing a part, irrespective of the actual amount of time taken. To the extent that a employee on average took less time to accomplish assigned tasks than the time credited to him or her, the employee received enhanced compensation when compared to a straight wage system based on actual time worked. In turn, an employee who on average failed to complete tasks in the allotted times would receive less compensation than under a straight time system.

The straight time system was used as a base for estimating performance under a flat rate system. Thus if a mechanic expected to receive credit under a flat rate system for 125 percent of the hours he or she actually worked, the worker stated he or she could do ''125%'' under flat rate.

[6] House of Honda's contract with the Union covering unit employees established traditional wage rates. Although the record is not uniformly clear on the issue, it appears that House of Honda employees believed the Union was opposed to flat rate conditions and that a flat rate shop was tantamount to a nonunion shop.

> [Batarse] just asked me what I did and how long I'd been with the company, what my position was there. He said he was deciding whether or not we were going to go flat rate or union. He was deciding. He asked me if it made any difference to me whether it was a union shop or nonunion, or whether flat rate was important—I mean, whether flat rate would matter to me. I said if I was going to get a preference, I would rather it was a union shop.
>
> Then he asked me what I thought of a flat rate shop, and I told him I had never really worked in one, so I don't know exactly what it would be like, because I'd always worked in a union shop, and I'd worked for the same place for 30 years, so that was what I was familiar with.

Batarse denied ever asking Ted Staat whether it made any difference if the shop was union or nonunion or stating he was deciding whether to go union or flat rate.

(2) Complaint paragraph 7(a)(ii)—On March 3, 1990, told an employee-applicant that Respondent felt strongly about ''going nonunion''

Tallman's testimony concerning the beginning of his interview with Batarse on March 3 is described above. Immediately after that portion of their interview, Batarse, in Tallman's recollection, said he ''felt strongly about going nonunion.'' Batarse denied the remark attributed to him.

(3) Complaint paragraph 7(b)(i)—In early March 1990 told an employee-applicant that Respondent was going nonunion

Peter Staat, nephew of Ted Staat and cousin of Troy Staat, had several meetings with Batarse and other agents of Respondent. Peter Staat described his fourth conversation with Batarse as occurring alone in Batarse's office. He testified:

> The first thing [Batarse] said to me is that, ''We are going to be opening a nonunion shop, and if the union were to come in, how would I vote, for him or for the union[?] I told him I would vote for him, for the flat rate.''
>
> And he told me that he needed to feel that he could trust me, and that his lawyers were telling him not to hire any more union people, because if he hired more than 50 percent of the old workers back, that it would basically become a union shop. And he told me he wanted to feel like he could trust me, and he did want to hire me, but—I told him I had quite the union at that time, and he just said that was good, and that was basically it. He said he'd contact me again. He said he wanted to hire me, so just to keep in touch.

Batarse denied the remarks attributed to him.

(4) Complaint paragraph 7(b)(ii)—in early March 1990 interrogated an employee-applicant about how he would vote if the Union came in

The General Counsel's evidence offered in support of this allegation is the testimony of Peter Staat quoted immediately above.

(5) Complaint paragraph 7(b)(iii)—in early March 1990 told an employee-applicant that Respondent had been advised not to hire a majority of ''union people'' because Respondent would become ''union''

The General Counsel's evidence offered in support of this allegation is the testimony of Peter Staat quoted above.

(6) Complaint paragraph 7(b)(iv)—in early March 1990 told an employee-applicant that Respondent could trust him because he had ''quit the Union''

The General Counsel's evidence offered in support of this allegation is the testimony of Peter Staat quoted above.

b. *Against Steve Saint*

(1) Complaint paragraph 7(c)(i)—In early March 1990 told an employee-applicant that Respondent was not going to let the Union in

Peter Staat initially interviewed with Batarse on March 2 and a second time on March 5. A few days later Peter Staat stopped by the dealership to speak to Batarse who was not initially available. Peter Staat then had a conversation with Steve Saint. Peter Staat testified that he asked Saint ''what was happening about hiring us back.'' Staat recalled Saint told him that Batarse did not want the ''union into his company'' and

> suggested that if I wanted to get hired back, that I should quit the union, and I told him I would.

Saint denied the allegations.

(2) Complaint paragraph 7(c)(ii)—In early March 1990 told an employee-applicant that he must ''quit'' the Union as a condition of being hired

The General Counsel's evidence offered in support of this allegation is the testimony of Peter Staat quoted immediately above.

(3) Complaint paragraph 7(c)(iii)—In early March 1990 told an employee-applicant that if it hired more than 50 percent of the former employees it would have to deal with the Union

Ted Staat was eventually scheduled for a second interview with Batarse on March 14. Upon Staat's arrival at the dealership for his interview, he discovered Batarse was busy so he spoke initially with Steve Saint. Staat inquired of Saint about who was going to be hired and what was going to happen. Staat described Saint's reply:

> And [Saint] said that they decided they were going to go with flat rate, and that as far as he knew—he wasn't real positive—as far as he knew Harlow [Hill] and Charlie [Bailey] would not be hired. He felt possibly I would be hired, and he had heard that Vince Brown and Pete Staat would be hired, but that Troy [Staat] wouldn't be hired because they had to keep the numbers down. Since it was going to be a flat rate shop, it would be nonunion, and if they hired too many of the people back, they would have to deal with the union, so he wouldn't get hired because of—the num-

> ber would be too great, because, like I said, they were going to go nonunion with a flat rate shop.
>
> And he also said that at one point he was attempting to buy the dealership, and had he been able to close the deal, that he would have done the same thing that Rudy [Batarse] was doing and go nonunion, simply because every time you had to deal with the union, it was just too much trouble. If you had people you didn't want to keep for some reason, or they didn't perform the way you wanted them to, it was just too hard to get rid of them if you had the union. So he would have done the same thing Rudy would have done and go with a nonunion situation.

Saint denied making these statements to Ted Staat.

(4) Complaint paragraph 7(c)(iv)—In early March 1990 told an employee-applicant Respondent could not hire too many union people and had to keep the number below 50 percent

The General Counsel offered the testimony of Ted Staat immediately above in support of this allegation.

(5) Complaint paragraph 7(d)—In the latter part of March or early April 1990, told employee-applicants that Respondent would not hire former Jim Close Honda employees because of the Union

Not having been hired, Ed Tallman visited the dealership in late March or early April and spoke to Steve Saint in his office. He described the conversation as follows:

> I told [Saint] that—I said, the parts department, they look pretty busy, and I asked him what happened to the other guys who used to work there, and he said that they couldn't hire them back because there was some kind of a union thing, and he said it had something to do with the percentage of people that they could or could not hire back. And I said, well, it was too bad, because, you know, they were good guys, they're good workers.

Saint denied the remarks attributed to him.

c. *Against Parker Luciano*

(1) Complaint paragraph 7(e)—In early March 1990 interrogated an employee-applicant about whether he had ''quit'' the Union

Peter Staat, following his interview with Batarse described above, testified that ''on the way out'' he stopped and talked to Parker Luciano and Lance Cabral. Staat testified:

> I asked Parker [Luciano] what was Rudy [Batarse's] hang-up about the union, why was he letting it bother him for not hiring us, and he asked me if I'd quit the union. And I told him yes, I did. He said Rudy wasn't going to let the union into his company, he did not want them into his company. And I also spoke with Lance [Cabral], and Lance told me that Rudy did not want to hire people that were not loyal to him.

Parker Luciano denied the remarks attributed to him. Lance Cabral testified that the conversation occurred but without reference to the Union.

(2) Complaint paragraph 8(c)—On or about August 29, 1990, coercively interrogated a former employee concerning his participation in the investigation of Case 32–CA–11174 involving Respondent

Tallman received a telephone call from Parker on August 29. Tallman recalled that Parker told him he did not have to talk to him. Tallman did not recall, however, receiving assurances that no reprisals would be taken against him if he chose not to do so. Parker raised with Tallman a statement Tallman had made to Lance Cabral earlier that if necessary Tallman would lie in court for Parker. Parker assured Tallman he did not want him to ''do anything to hurt yourself . . . or to get in trouble.'' Parker testified similarly.

d. *Against James Campbell*

(1) Complaint paragraph 8(a)(1)—In June or July 1990 coercively interrogated former employees of Respondent concerning each's participation in the investigation of Case 32–CA–11174

Tallman testified that in the last week of June he received a telephone call from James Campbell, a private investigator retained by Respondent. Campbell, in Tallman's memory, identified himself as a private investigator but indicated he was ''not really working for nobody, I'm just taking the information and getting my own—on my own ideas.'' Tallman recalled that Campbell asked about Tallman's interview with Batarse and what was said in their meeting. Tallman specifically denied that Campbell made any statements respecting Tallman's right not to speak to the investigator nor gave Tallman any assurances that no reprisals would be taken against Tallman if he chose not to discuss the matter with Campbell. Campbell did not testify.

Ted Staat testified that Campbell telephoned him in June and told him that he did not have to speak to him if he did not wish to. Campbell did not however give assurances to Staat against reprisals. Campbell asked about Staat's contacts with Respondent's agents. Ted Staat stated that since he now worked for Rudy Batarse's father at a different auto dealership he did not want to go into great detail. Campbell called again in August with similar questions, but on this occasion did not tell Staat that he need not speak to him nor did he tell Staat that no reprisals would be taken against him.

(2) Complaint paragraph 8(a)(2)—On or about July 11, 1990, coercively interrogated an applicant for employment concerning his union activities

The General Counsel offered the testimony of Tallman and Ted Staat described immediately above.

(3) Complaint paragraph 8(a)(3)—On or about August 28, 1990, coercively interrogated a job applicant concerning said employee's participation in the investigation of Case 32–CA–11174 involving Respondent

Peter Staat testified that on August 28 Campbell called him and asked him if he had given an affidavit in the Board

investigation. Staat testified Campbell did not tell him he had no obligation to talk to Campbell nor did Staat receive any assurances that no reprisals would be taken against him if he chose not to talk.

Joel Ramsey, an unsuccessful applicant for employment who interviewed with Saint in March, testified he received a telephone call from Campbell in August. Campbell did not tell Ramsey that Ramsey was under no obligation to speak to him nor did he give Ramsey assurances that no reprisals would be taken against him. Rather Campbell asked Ramsey about his conversations with Respondent's agents.

(4) Complaint paragraph 8(a)(4)—On or about September 4, 1990, coercively interrogated a job applicant about his participation in an NLRB investigation and his union sympathies, and warned that his refusals to respond to the interrogation would be reported back to management

Troy Staat testified that on September 4 he received a telephone call from James Campbell at his home. Troy Staat testified that Campbell identified himself as representing Rudy Batarse and wanted to know about what Staat had told the ''Labor Board.'' Staat declined to answer. After further prodding proved unsuccessful, Campbell stated in Staat's recollection:

> Well, okay, you don't have to talk to me if you don't want to, but I'll have to go back and report to my people that you refused to say anything.

In Staat's recollection Campbell neither told him that he did not have to speak to Campbell nor gave him assurances that no reprisals would be taken against him if he chose not to discuss the matter.

(5) Complaint paragraph 8(a)(5)—On or about September 13, 1990, coercively interrogated a former employee of Respondent concerning his union sympathies

Troy Staat testified that he received a telephone call from Campbell about a week after his September 4 conversation. Campbell asked Staat if he wanted his former job back. His second question was in Staat's recollection: ''If you got your job back, would it have to be union?'' Campbell did not make any statement about Staat's right not to speak to him nor did he assure Staat that no reprisals would be taken against him if he chose not to respond.

e. *Against John Guay*

(1) Complaint paragraph 8(b)(1)—In or about June 1990 coercively interrogated a former employee concerning his participation in the investigation of Case 32–CA–11174 involving Respondent

See the testimony of Tallman immediately below.

(2) Complaint paragraph 8(b)(2)—On or about August 29, 1990, coercively interrogated former employee concerning his participation in the investigation of Case 32–CA–11174 involving Respondent

Soon after Tallman's August telephone conversation with Luciano, set forth above, Respondent's retained private investigator John Guay telephoned Tallman. Guay told Tallman, in Tallman's recollection, that he wanted to talk to him but that Tallman did not have to ''talk to me if you don't want to.'' Tallman specifically denied that Guay made any assurances whatsoever that no reprisals would be taken against Tallman if he elected not to speak to Guay. A meeting was arranged for the next week. On the scheduled day Guay telephoned Tallman to confirm the appointment but Tallman canceled and declined to set another date. A few days later Guay called again seeking a meeting but Tallman put him off. Guay did not testify.

2. Allegations of violations of Section 8(a)(3) and (1) of the Act

As noted supra, Respondent hired 3 of the 13 unit members of House of Honda who sought employment, declining to hire the other 10.[7] These 10 are alleged by the General Counsel in paragraph 9 of the complaint to have been refused employment by Respondent in order to avoid becoming obligated to recognize and bargain with the Union in violation of Section 8(a)(3) and (1) of the Act. They are:

Adrien Abbadie	Ted Staat
Charles Bailey	Troy Staat
James Fuller	Edward Tallman
Harlow Hill	Nathaniel Taylor
Peter Staat	Herman Troche

There is no dispute that these 10 sought but did not obtain full-time unit employment from Respondent. The parties litigated closely the motivations and conduct of Respondent's agents, the skills and experience of the job seekers both from the House of Honda and otherwise and the probability and credibility issues underlying conflicting versions of events. The hiring issues, which incorporate the factual disputes underlying the independent allegations of violations of Section 8(a)(1) of the Act, are the heart of the instant case.

3. The allegations of violations of Section 8(a)(5) and (1) of the Act

There is no dispute that the Union sought recognition and bargaining of Respondent or that Respondent declined to recognize or bargain with the Union as the representative of unit employees at least prior to the court order noted, supra. Further, there is no dispute that Respondent's initial terms and conditions of employment for unit employees were different from the contract terms in effect for unit employees at House of Honda prior to its closure. Finally, there is no doubt, again at least prior to the court order, that Respondent, consistent with its refusal to recognize the Union as the representative of unit employees, failed and refused to bargain

[7] These numbers disregard Luciano who was hired into the supervisory and therefore nonunit position of parts manager. They include Abbadie who was later offered a part-time job by Respondent, but declined the offer.

with the Union respecting terms and conditions of unit employees' employment and failed to notify the Union of or provide it an opportunity to bargain respecting subsequent changes in employees' working conditions.

The General Counsel contends that Respondent was obligated to recognize and bargain with the Union from the very start of its operations specifically including an obligation to bargain about setting of initial terms and conditions of employment. This position is predicated on the assumption that the General Counsel's allegations of violations of Section 8(a)(3) and (1) of the Act are sustained to a sufficient degree so that it will have been found that Respondent should have hired a majority of its unit employees from among the predecessor's unit employees and that, consequently. a successorship bargaining obligation was incurred. Accordingly, the General Counsel contends that each of Respondent's refusals as set forth immediately above was in derogation of its obligations to recognize and bargain with the Union and therefore, in each instance, Respondent violated Section 8(a)(5) and (1) of the Act.

These issues involved primarily applications of undisputed facts and fundamental legal doctrines to the hiring decisions of Respondent under attack by the General Counsel. Thus the dispute is in large degree dependent on and resolved by the final determination on the merits of the 8(a)(3) allegations of the complaint.

C. *Argument of the Parties*

1. The 8(a)(1) and (3) allegations

The General Counsel adduced evidence from House of Honda employees and job applicants, noted in part, supra, that Respondent's agents were concerned with the union sympathies of at least some House of Honda job applicants and were further concerned with hiring less than a majority of House of Honda employees so as to avoid incurring a bargaining obligation. The General Counsel augmented that evidence with testimony from Union Official Tolentino and others designed to show that Rudy Batarse from the outset had no intention of recognizing and bargaining with the Union and that he and his agents wrongfully refused to hire 10 House of Honda employee-applicants in furtherance of an illegal scheme to avoid union representation of employees. The Charging Party in particular attacked the credibility of Respondent's agents Batarse and Saint on brief.

Respondent primarily through the testimony of Respondent's agents and job applicants sought to demonstrate the allegations against Respondent were neither credible nor plausible. Rather, Respondent argues, Batarse in determining to acquire the House of Honda enterprise realized that a successful purchase and operation of the dealership required the operation of the parts and service departments on a flat rate as opposed to an actual time or hourly rate compensation system. Based on this determination, Batarse, with Luciano's assistance, hired employees who would in his judgment perform best in that environment.

The factual contentions of the parties were closely litigated. The bulk of the participants who participated in the disputed events as well as House of Honda applicants and Respondent's unit employees testified. Cross-examination was rigorous and lengthy. Perhaps because of the court litigation that had occurred before the matter came to hearing, there were an unusual number of prior statements, declarations, and affidavits by the witnesses. These were used by counsel to identify and probe inconsistencies in witnesses' recitations of events. Posthearing briefs were unusually thorough and effective in attacking the credibility of the opposing witnesses, buttressing supporting witness, and in analyzing the various probabilities of events. Greater detail is presented in my resolution of credibility, infra. The factual aspects of the case were ably and vigorously disputed.

The legal issues of this portion of the case were not in substantial dispute save as to the postcomplaint interrogation allegations associated with Respondent's investigation prior to litigation. This portion of the complaint in turn did not involve significant factual disputes inasmuch as Respondent's agents Campbell and Guay did not testify. The relevant legal arguments advanced are discussed, infra.

2. The 8(a)(5) allegations

The successorship issue underlying the bargaining obligation urged by the General Counsel was narrowly presented. There was no dispute about any aspect of the relationship between the House of Honda and Respondent save for the number of unit employees of House of Honda who should have been hired as unit employees of Respondent. Respondent did not at any relevant time have an actual majority of unit employees from the House of Honda. If the 10 individuals alleged as discriminatees had been hired by Respondent consistent with the allegations of the complaint, there would also be no doubt that Respondent's unit would have had a significant majority of House of Honda unit employees. Thus, the failure to recognize and bargain allegation turns on the resolution of the allegations of violations of Section 8(a)(3) of the Act in the complaint—i.e., that Respondent improperly failed to hire 10 House of Honda unit employees. If the General Counsel is sustained in his 8(a)(3) allegations or is sustained in a sufficient number to create a constructive successorship, then Respondent was obligated to recognize and bargain with the Union respecting unit employees.

The parties seemed at least implicitly to agree that if Respondent has not violated Section 8(a)(3) of the Act in failing to hire a sufficient number of House of Honda unit employees, Respondent did not at any time become obligated to recognize or bargain with the Union. The parties further seem to agree that if a bargaining obligation was incurred, the changes in terms and conditions of employment in the unit initiated by Respondent after the obligation attached—without notifying the Union nor giving it an opportunity to bargain respecting the changes during that obligation—constitute violations of Section 8(a)(5) of the Act.

Assuming that a bargaining obligation exists, a final issue argued by the parties, which turns in significant part on the General Counsel's contentions respecting Respondent's hiring practices, is when the bargaining obligation would have attached. Thus the General Counsel argues that Respondent should be held to have constructively hired the House of Honda unit employees sufficiently early in the startup process to obligate Respondent to bargain with the Union respecting the setting of initial terms and conditions of Respondent's unit employees. If the successorship relationship between House of Honda and Respondent manifested itself as a matter of law subsequent to this point, Respondent was free to set initial terms and conditions of employment for

unit employees and was obligated only to bargain about changes in working conditions made after that bargaining obligation came into being.

F. *Analysis and Conclusions*

1. Credibility resolutions

The bulk of the directly conflicting testimony arrays the attributions of House of Honda employees, primarily Edward Tallman and the Staats, against the denials of Respondent's agents Rudy Batarse, Steven Saint, and Parker Luciano. Other testimony was adduced by both sides to either bolster their own witnesses and versions of events or to attack and impugn the opposing side's witnesses and version of events.

To the extent that the General Counsel's witnesses assert similar or related conduct by Respondent's agents which, attributions those agents deny, resolution of the disputed evidence tends to produce a one-sided outcome favoring either the General Counsel's or Respondent's witnesses. The credibility resolutions appearing below however are not based simply on a binary resolution of one party's witnesses against the other's, but are rather the result of individual consideration of each witnesses' testimony giving proper consideration to other credibility resolutions and findings made herein. Separate determinations appear below in an order designed for ease of comprehension. The earlier findings, however, as all findings herein, are based on the other findings made as well as the record as a whole and the demeanor of the witnesses.

a. *Rudy Batarse*

The determination of Rudy Batarse's credibility is perhaps most critical to resolution of the factual disputes in this case. He was Respondent's decision maker with respect to the challenged hiring as well as a participant in many of the disputed events. As set forth in some detail below, I was not persuaded by his demeanor and have largely discredited his testimony, particularly where it conflicted with the testimony of others.

Rudy Batarse was an experienced entrepreneur in the automotive sales world who demonstrated a sophisticated understanding of the financial aspects of automotive dealerships in the San Francisco Bay area. He gave serious consideration to the merits of acquiring the House of Honda dealership both from the perspective of that operation's true financial status as well as to the possibilities and potential the dealership might have under his control. Well before the acquisition Batarse consulted with labor counsel. Further, from his family and personal experience, he was familiar with ''organized'' facilities in the area as well as the personalities of the representatives of the Union representing the employees at such facilities. Batarse was therefore a sophisticated participant in the matters at issue.[8]

Batarse testified that his financial analysis of the House of Honda operation led him to conclude before acquisition that the parts and service departments had to contribute greater profits to the dealership to make Respondent's purchase viable and that substantially increasing service department employee productivity was the key to achieving this requirement. The General Counsel and the Charging Party challenged these assertions in various ways. I find however that Batarse's testimony in this regard was credible in terms of probabilities, i.e., that a potential purchaser would need greater profit contributions from the parts and service departments and that Batarse in particular held that opinion with respect to the parts and service departments of House of Honda. It was also credible in terms of demeanor, i.e., Rudy Batarse's testimony was confident and persuasive in this aspect of his testimony.

Batarse further testified that in staffing his parts and service departments he was concerned with obtaining employees that could meet his productivity goals and that the issue of labor organization representation of those employees was a matter, as counsel for Respondent advanced on brief, ''far from the head of the list.'' The General Counsel and the Charging Party countered that Batarse's asserted indifference to union representation was complete fabrication. I resolve this critical factual question in favor of the General Counsel and the Charging Party rejecting the able arguments of counsel for Respondent. I do so primarily because I discredit much of Batarse's testimony. I simply found incredible and unlikely his testimony of the relative subjective unimportance of this issue to him.

I take this decision for several reasons not least of which was that Batarse's demeanor was particularly unconvincing during these portions of his testimony. Further, I formed the belief that Batarse relied on expedience and disinformation rather than frankness in his dealings with Tolentino respecting the Union. To the extent the two individual's versions of their conversations differ, I credit Tolentino. I do so primarily on demeanor. He struck me as a straight forward witness concerned with telling what he recalled rather than pursuing some independent agenda. I find Batarse in effect led the Union's representative on by concealing his own intentions behind blank assurances and benign half truths designed to put the Union's representative off and gain time to have his nonunion operations well underway before a final break with the Union was consummated. This behavior in my view revealed a tendency first not to be rigorously bound by the truth when it may cause discomfort or difficulty and, second, an awareness that the issue of union representation was important and pressing.

I see no inconsistency in crediting Batarse's testimony that he believed that significant changes in the operation of the service and parts departments would be necessary and in discrediting his testimony that his hiring decisions were in furtherance of that goal and not based on union or representational concerns. This is so because I conclude based on the record as a whole that Batarse believed and acted on the belief that the changes he felt were needed in the parts and service departments could not be accomplished, or at least could not be accomplished without great difficulty, if the employees were represented by the Union. It is clear that a ''flat rate'' system was perceived as a virtual necessity by Batarse. It is also clear on this record that Batarse, as apparently virtually all the witnesses who expressed any opinion on the matter at the hearing, believed that ''flat rate'' was

[8] Counsel for Respondent on brief points out that Batarse's first tongue is not English, and urges this fact be taken into consideration in making findings here. I agree and have done so. Batarse's perhaps less than glib command of the idiom, however, does not detract from my findings above reflecting his ability or sophistication regarding the commercial and legal aspects of the case.

anathema to the Union and that ''flat rate'' and ''non-union'' could be used interchangeably. Under such an analysis, Batarse's business analysis coupled with his view that the Union would not allow needed changes in the compensation system within the service and parts departments combine to form a powerful motive to insure the Union did not represent Respondent's unit employees. Given this motive coupled with an understanding of the circumstances leading to a successorship bargaining obligation, Respondent's selective hiring of House of Honda applicants was not implausible.

I also agree with the arguments of the General Counsel and the Charging Party that Batarse did not fairly utilize the sources available to him to determine the relative merits of the House of Honda service employees. Thus House of Honda Service Manager Don Sipple, testified credibly that he was never asked about nor reported on his views of the relative merits of the individuals he had directly supervised for some years. While Respondent argues that Sipple was a holdover from a system Batarse rejected as insufficiently productive, this is not a sufficent explanation of why Sipple's opinions should have been at least solicited and considered. Batarse's conversation with Luciano respecting the House of Honda parts employees stands in marked contrast to his studius disregard of Sipple's knowledge of the skills of the service employees at House of Honda.

Finally, my discrediting of Batarse is based in significant part on my crediting of the various employees whose testimony is noted supra in support of the General Counsel's complaint allegations against Batarse. The testimony of Tallman and Ted and Peter Staat as well as the other House of Honda employees like Taylor who testified on behalf of the General Counsel was vigorously and meticulously attacked in an excellent brief by counsel for Respondent. Counsel's skill however failed to overcome my essential confidence in their testimony based on their persuasive demeanor at trial. Thus, for example, I did not find Tallman's remarks about lying, if necessary, to protect Luciano, fatally undermined his testimony. Nor do I find the fact that Peter Staat did not produce a receipt for the union membership withdrawal card he described in his testimony, nor the Union's inability to find any evidence of his having withdrawn, establishes that he did not in fact do so as testified. These facts as well as the other testimonial inconsistencies advanced by Respondent are relevant to resolving credibility and have been considered. On balance, however, even in the face of the burden of proof the General Counsel bears in proving each element of the complaint, I find the record evidence given my view of the relative demeanor of the witnesses strongly favors the testimony credited above. I simply do not believe these individuals fabricated the remarks they attributed to Batarse. Rather I believe Batarse, well aware of the potentially adverse consequences to Respondent and therefore his own pecuniary interest, has simply denied conduct he finds inconvenient to admit and supply expedient explanations for conduct undertaken for improper reasons.

b. *Steve Saint*

I found Saint to be an unsatisfactory witness who failed to engender confidence in the veracity of his testimony. The General Counsel's witnesses, Peter Staat, Ted Staat, and Ed Tallman attributed statements to Saint set forth in section III,l,b, supra. Saint denied the attributions. As noted supra, I found these individuals to be convincing witnesses who testified truthfully to events they recalled. I found Saint's denials unpersuasive primarily on demeanor grounds. I credit the General Counsel's witnesses over Saint.

c. *Parker Luciano*

Parker Luciano, corroborated by Assistant Parts Manager Lance Cabral, denied the remarks attributed to him by Peter Staat respecting quitting the Union, supra. Luciano had himself ''quit'' the Union by withdrawing. It is not unreasonable that he might consider such an action by an employee applicant an act of necessary loyalty to Respondent. Neither Cabral nor Luciano's denials in this regard struck me as persuasive. I have previously found Peter Staat's testimony highly credible. I make the same finding here and credit Peter Staat over Luciano and Cabral.

2. The allegations of 8(a)(1) violations

a. *Paragraph 7 of the complaint*

There is no dispute that Batarse, Saint, and Luciano are agents of Respondent. I have credited the testimony adduced in support of the allegations in paragraph 7 of the complaint as recited in section III,B,1,b, supra. The General Counsel on brief cited numerous recent Board cases in support of the complaint allegations[9] which legal propositions Respondent does not seriously contest. Based on that authority, given the factual findings made, supra, I find the General Counsel has sustained the various allegations of violations of Section 8(a)(1) of the Act set forth in paragraph 7 of the complaint.

b. *Paragraph 8 of the complaint*

Paragraph 8 of the complaint alleges Respondent's agents Campbell, Guay, and Luciano violated Section 8(a)(1) of the Act in their postcomplaint investigation conversations with employee applicants. The facts are not in essential dispute.

The General Counsel cites Board authority beginning with the fountainhead decision in *Johnnie's Poultry Co.*, 146 NLRB 770 (1964), enfd. denied on other grounds 344 F.2d 617 (8th Cir. 1965), that an employer's agent questioning employees in interviews undertaken to prepare for unfair labor practice hearings must: (1) explain the purpose of the questioning, (2) assure the individual that the interview is voluntary and, finally, (3) give assurances that no reprisals will be taken against him or her. The General Counsel argues on brief: ''Although in some instances some of the requirements were met—in no instance were all of the requirements met.''

[9] *Potters Chalet Drug*, 233 NLRB 15 (1977)—improper interrogation to ask applicant about willingness to work in nonunion shop or to inform applicant that employer was going nonunion or to inform applicant that a limit to the number of predecessor employees who could be hired exists. *Continental Inn*, 186 NLRB 248 (1970)—improper to tell applicant employer felt strongly about going nonunion. *Bucyrus Foodland North*, 247 NLRB 284 (1980)—improper to inquire how applicant would vote in union election. *Bakers of Paris*, 288 NLRB 91 (1988)—improper to tell applicant he could be trusted because he had quit the union. *Thriftway Supermarket*, 276 NLRB 1450 (1985)—improper to tell an applicant that the employer was not going to let the union in. *Bridgeway Oldsmobile*, 281 NLRB 1246 (1986)—improper to tell an applicant he must quit the union as a condition of being hired.

Respondent argues that a per se approach in which an employer is required to mechanistically give the itemized assurances on every occasion is to be disfavored over a ''totality of the circumstances'' approach. Under such an analysis, argues Respondent, the fact that Respondent's employees were not involved augers for a finding of no violation. Further Respondent notes the events at issue occurred over the telephone, a situation particularly empowering to an interviewee who might simply disconnect the call at anytime he or she desired. Finally, Respondent argues that when the employee contacts were made simply to determine if a given individual would accept reinstatement, if offered, the entire *Johnnie's Poultry* doctrine is simply not involved and no violation results from any failure to give explanations or assurances. Respondent also argues that the Luciano and Guay conversations with Tallman presented special circumstances which render each not improper.

Turning to the Campbell conversations with applicants about events, I find counsel for the General Counsel has sustained her allegations of a violation of Section 8(a)(1) of the Act. The uncontested testimony of the witnesses reveal that on various occasions Campbell failed to identify his principal, variously failed to give the required assurances, suggested to one interviewee that a failure to cooperate would be reported to Respondent and generally failed to meet the requirements of the decisional law. The majority of the interviewees at issue were named as discriminatees in the complaint. At least one was employed at another employer over whom Batarse had at least arguable influence. The pattern of Campbell's conduct diminishes any argument that any particular error was innocuous or simply inadvertent. Under a per se and totality of the circumstances analyses, Campbell's course of conduct violated Section 8(a)(1) of the Act. I agree with Respondent however that Campbell's contacts with alleged discriminatees, which were limited to asking the individual if a job offer would be acceptable, is not the situation contemplated by the *Johnnie's Poultry* line of cases and Respondent in those circumstances did not violate the Act.

Tallman's conversation with Luciano also presents a special situation which does not rise to the level of a violation. In my view the conversation, although initiated by Luciano, was more in the nature of a conversation between friends or former friends rather than a formal inquiry. Further Luciano's call resulted from Tallman's earlier remarks to Cabral respecting his willingness to lie in court to protect Cabral and/or Luciano. In one sense Luciano's call to Tallman was defensive or protective as he sought to assure Tallman that he did not wish Tallman to testify to other than the truth. Given this context I do not find the requirements of *Johnnie's Poultry* and its progeny apply. Accordingly, I shall dismiss this allegation.

Guay's conversation with Tallman followed Luciano's. Luciano had suggested that Tallman might receive advice from Guay. Tallman testified he received assurances from Guay that any interview was voluntary but did not receive assurances against reprisals. This conversation shares with Luciano's the special context of Tallman's earlier remarks to Cabral. Given this special setting and further noting that, even if found violative of the Act, this allegation would not expand the remedy directed infra, I find Guay's statements did not violate the Act.

3. The 8(a)(3) allegation

a. *The General Counsel's prima facie case*

The General Counsel argues the 10 named House of Honda employees were not hired as a result of Respondent's illegal desire to avoid becoming obligated to recognize and bargain with the Union as a successor to the House of Honda. Counsel for the General Counsel supported her case in large part with the evidence offered in support of the independent violations of Section 8(a)(1), discussed supra, and in an attack on the testimony of Respondent's principal, Rudy Batarse. In turn Respondent challenged the testimony of the General Counsel's witnesses and adduced testimony by Batarse that his hiring decisions were based on business reasons independent of any concerns respecting either becoming a successor to House of Honda or otherwise becoming obligated to recognize and bargain with the Union.

I have sustained the bulk of the General Counsel's allegations of 8(a)(1) violations, supra. I have also discredited Batarse's testimony that the avoidance of a successorship bargaining obligation was not a motivating force in hiring Respondent's unit employees. Thus, I have found that Respondent's agents, including Batarse, were opposed to union representation of the unit, believed that Respondent would become obligated to recognize and bargain with the Union if a majority of House of Honda unit employees were hired and, finally, were determined to hire few of the House of Honda's unit employees for that very reason.

There is no dispute that an employer may not selectively hire or refuse to hire another employer's employees in order to avoid becoming obligated to recognize and bargain with a union. In refusing to hire a particular applicant or applicants for that reason, an employer violates Section 8(a)(3) and (1) of the Act. *D & K Frozen Foods*, 293 NLRB 859 (1989). Given all the above, it is clear and I find that counsel for the General Counsel has sustained her prima facie case respecting the 8(a)(3) allegations of the complaint.

b. *Respondent's Wright Line defense*

In *Wright Line*, 251 NLRB 1083, 1089 (1980), the Board established the current causation test in cases alleging a violation of the Act turning on employer motivation.

> First, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a ''motivating factor'' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct [fn. omitted].

Therefore the finding that the General Counsel has established a prima facie case, while shifting the burden of proof to Respondent, does not preclude Respondent from establishing that one or more, or indeed all, of the 10 alleged discriminatees would not have been hired, even if there had been no union representation at House of Honda and hence there had been no independent significance to Respondent what proportion of Respondent's unit employees were hired from House of Honda unit applicants.

The initial consideration of Respondent's defense is best done on an individual basis within the parts and service departments.

(1) The parts department

The parts department at the House of Honda was staffed by Parker Luciano, Lance Cabral, Adrien Abbadie, Ed Tallman, and James Fuller. Respondent hired Luciano and Cabral and did not hire Abbadie, Tallman, or Fuller. Abbadie was later offered a part-time position which he refused. In mid-March Respondent hired new employees Kent Frasier, Alex Hernandez, and Paul Moore.

(a) *Ed Tallman*

Batarse and Luciano discussed parts department employees in February and thereafter. Luciano testified that he told Batarse that Tallman was a ''good parts man'' but that ''from time to time he had a little bit of an attitude.'' While Luciano recommended that some individuals be hired and some not, with Tallman he testified he made no recommendation. Batarse told Luciano that a decision would be made about Tallman following the interviews and after all options had been considered.

Following Tallman's contacts with Luciano and Batarse described in part supra, he was not hired. The General Counsel notes that Tallman had 2-1/2 years' experience with House of Honda and had received the ''Counterman of the Year Award'' in 1989. Respondent argues that Tallman's responses in his interview with Batarse as well as his relative lack of experience justified his nonhire given the other applicants available.

I have discredited Batarse's testimony respecting Tallman's conversations with him. Given the burden of proof at this stage of the analysis is on Respondent and my factual resolution of the credibility conflicts, supra, I find Respondent has not established that Tallman would not have been hired but for the union considerations found a part of Respondent's motivations, supra. Accordingly I find by not hiring Tallman, Respondent violated Section 8(a)(3) and (1) of the Act.

(b) *Adrien Abbadie*

Luciano testified he had recommended Abbadie not be hired because of health problems and a neck injury which affected his attendance. The parties stipulated that Abbadie would have testified that he interviewed with Batarse and in that interview expressed willingness to work under a flat rate system. Batarse did not offer Abbadie employment initially but in April offered him part-time work which Abbadie refused.

Given my findings that Respondent, including Batarse and Luciano, were engaged in a plan to avoid hiring House of Honda employees, I do not find the credible evidence concerning Abbadie sufficient to sustain Respondent's defense herein. Accordingly, I shall sustain the General Counsel's allegation respecting Abbadie.

(c) *James Fuller*

James Fuller was a parts driver at the time of the House of Honda closure. He had earlier been discharged and reinstated pursuant to an agreement with the Union. Luciano recommended to Batarse that he not hire Fuller. Fuller submitted an application as did all House of Honda unit employees but was never interviewed by Batarse.

I find there is sufficient evidence on this record—primarily the strong recommendation by Luciano that Fuller not be hired and the fact that he was not even interviewed—to find that Fuller would not have been hired by Respondent even if the Union had not represented unit employees at the House of Honda at its close. I do not accept the proposition, implicit in the General Counsel's argument, that Fuller was also a victim of discrimination because of his earlier use of the Union to gain reinstatement as a House of Honda employee. The fact that Fuller's position at House of Honda resulted from past union actions to protect his job is not controlling on this record. Luciano and Saint did not think well of Fuller's work and so reported to Batarse. Such poor reports sustain Respondent's burden here. Accordingly, I find Respondent did not violate Section 8(a)(3) and (1) of the Act when it failed to hire Fuller. This portion of the complaint shall be dismissed.

(2) The service department

The service department unit employees at the House of Honda totaled six employees. Respondent hired one, Vince Brown. It did not hire Harlow Hill, Charles Bailey, Ted Staat, Peter Staat, or Troy Staat. Respondent hired the following service technicians who had not worked for House of Honda: Bernd Koegler, Dan Martin, Richard Rigdon, and Steve Vaughn. John Crawford was hired as a detailer and Moises Villamar was hired as a lot attendant.

As noted supra, I have found that Batarse did not discuss the House of Honda service employees' skills with Sipple. Luciano and Saint described in general terms the skills of the service employees. I have concluded, discrediting the contrary testimony of Respondent's agents, that the service department employees were not scrutinized on merit because of Respondent's desire to avoid a successorship relationship which would obligate Respondent to bargain with the Union. I find that the evidence offered by Respondent, primarily Batarse's testimony respecting his evaluation of the House of Honda service department applicants based on their interviews as well as the merits of the non-House of Honda applicants, inadequate to overcome the strong prima facie case established by the General Counsel.

In making this finding I specifically discredit the testimony of Batarse that nepotism avoidance was a factor in failing to hire some or all of the Staats. I find this rationale was simply offered to cloak a decision actually based on antiunion considerations. I also reject his testimony that in hiring non-House of Honda service department employees, he made his decisions based on relative merits independent of union or representational considerations. Thus I find that, unlike the instance of Fuller noted supra, there is insufficient credible evidence with respect to any other individual that Respondent would have refused to hire him had the representation avoidance motivations of Respondent not been present. Accordingly, I sustain the allegations of the complaint respecting the wrongful failure to hire Harlow Hill, Charles Bailey, Ted Staat, Peter Staat, and Troy Staat.

(3) Other unit positions

House of Honda utilized the services of two detailers, Dennis Clark and Nathaniel Taylor. Respondent hired Clark. Later Respondent elevated Clark to a ''lot manager.'' Subsequently Batarse interviewed and hired a new employee, John Crawford, as detailer without offering the position to Taylor. Thereafter he hired lot attendant Moises Villamar.

Given my findings, supra, respecting Respondent's motivations, I find insufficient credible evidence sufficient to sustain Respondent's burden of proof that Taylor would not have been hired even if union representation was not a factor during the hiring process. Accordingly, I sustain the allegations of the complaint respecting Taylor to the extent that he should have been offered employment in lieu of Crawford.

c. *Summary and conclusion respecting 8(a)(3) allegations*

I have found and concluded that Batarse was anxious to avoid becoming obligated to recognize and bargain with the Union respecting Respondent's unit employees. I further found that Batarse believed that, to avoid the Union, he must avoid staffing his unit with enough House of Honda employees to constitute a majority of the new unit. I found that he therefore embarked on a plan—one communicated directly or indirectly to his agents, Saint and Luciano, to ensure that the number of House of Honda job applicants hired in the unit was safely below the triggering level.

Having reached this conclusion, it remained to consider each House of Honda unit member applicant not hired by Respondent to determine if, notwithstanding the above findings, that individual would not have been hired. Placing the burden of proof on Respondent in this aspect of the case, I found sufficient credible evidence to sustain a finding that only a single applicant, James Fuller, would not have been hired, had antirepresentational motivations not driven Respondent's actions.

Therefore I sustain the allegations of the General Counsel that Respondent violated Section 8(a)(3) and (1) of the Act by not hiring the following individuals:

Adrien Abbadie	Troy Staat
Charles Bailey	Edward Tallman
Harlow Hill	Nathaniel Taylor
Peter Staat	Herman Troche
Ted Staat	

4. The allegation of 8(a)(5) violations of the Act

a. *The bargaining obligation*

Given the findings set forth above respecting the improper failure to hire House of Honda unit employees, it is appropriate to count the applicants improperly refused employment as constructive employees for purposes of determining if Respondent was a successor to House of Honda respecting the unit. Given the failure to hire findings, supra, there is no doubt and I find that Respondent should have hired, and here is considered for purposes of determining successorship to have hired, the nine unit members named as discriminatees, supra. Including these individuals and excluding the nine other individuals hired improperly in their stead, Respondent's unit at all times had a substantial majority of employees from the House of Honda unit represented by the Union.

Given the other requirements of successorship were not in dispute, I find Respondent's unit is a successor to the House of Honda unit and, accordingly, Respondent is bound to recognize and bargain with the Union as representative of its unit employees.

b. *The time the bargaining obligation attached*

A remaining issue is when the above determined bargaining obligation first came into being. The legal consequence of that determination—whether Respondent was obligated to bargain with the Union over respecting the establishment of initial terms and conditions of employment offered employees to the extent they varied from those in effect at the House of Honda—substantially effects both the violations found and the scope of the remedy.

Board law generally provides that a successor employer's obligation to bargain attaches when a majority of employees in a representative compliment of the unit comes from the predecessor's represented unit. Since under this standard a bargaining obligation attaches only after a representative number of employees have been hired, no obligation to bargain over the terms initially offered employees is created as a result of the simple proposition that no employees or an insufficient number have yet been hired to make the ''successorship'' determination at the startup of the new operation.

An exception to this typical situation occurs when a determination is made that the successor employer intends from the very onset of the takeover that the predecessor's unit will be retained as the successor's unit employees. Thus the Supreme Court held in *NLRB v. Burns Security Services*, 406 U.S. 272, 294–295 (1972), that, in situations where it was ''perfectly clear'' that the new employer planned to retain the predecessor's employees, the bargaining relationship commences ab initio and obligates the employer to bargain respecting initial terms and conditions of employment. The remedy directed in failure to bargain cases changes in these situations because, typically, a restoration of the status quo ante and concomitant make whole order requires an employer to restore conditions as they were before the failure to recognize and bargain occurred. If the failure to bargain arises at the very start of the process, the status quo ante is the terms and conditions of employment in effect under the predecessor, here the House of Honda-Union collective-bargaining agreement.

Clearly Respondent did not tell either Jim Close nor the House of Honda unit employees that House of Honda unit employees were going to be hired en mass by Respondent. The General Counsel however argues that Respondent's conduct supports an ab initio bargaining obligation. The General Counsel advances a specific case as controlling of the result here. In *Fremont Ford*, 289 NLRB 1290, 1296 (1988), the Board held that an employer's statements to a union representative that he had doubts about the retention of only a few of the current employees of the predecessor was sufficient to show that it was ''perfectly clear'' that the successor would retain the predecessor's employees when it took over operation, even though in the actual event that employer wrongfully failed to hire many of the predecessor's employees. The Board held at 1297–1298:

> Moreover, ''any uncertainty as to what Respondent would have done absent its unlawful purpose must be resolved against Respondent, since it cannot be permitted to benefit from its unlawful conduct.'' *Love's Barbecue Restaurant*, 245 NLRB 78, 82 (1979). Therefore, the Respondent was not free unilaterally to set initial terms of employment. Accord: *State Distributing Co.*, 282 NLRB 1048 (1987).

I have credited the testimony of Tolentino that Batarse during his attempts to discuss the new dealership and the Union ''time and time again'' assured Tolentino:

> Don't worry about it, Bernie, we've always had a good relationship. We need good help and were not going to have any problems with the union.

I find these statements to Tolentino by Batarse at a time when Tolentino was attempting to sound out Batarse's intentions respecting the new dealership were designed to convince Tolentino that Respondent would retain the House of Honda unit employees—''We need good help''—and further convince him that Respondent would recognize the Union and sign a contract—''were not going to have any problem with the union.''

I find in this context Batarse's statement respecting ''union help'' meets the ''perfectly clear'' test as applied in *Fremont Ford*, supra. Further, the ''no problems with the Union'' assurance clearly tricked Tolentino into deferring any formal demand for recognition until well after Respondent's operations were underway. Given this duplicitous conduct, Respondent is estopped to argue that the Union's demand for recognition and bargaining was not sufficiently timely to invoke the ''initial terms'' bargaining obligation advanced by the General Counsel.

Accordingly, I find Respondent was obligated to bargain with the Union respecting unit employees from the very beginning and was as a consequence obligated to bargain over unit employees' initial terms and conditions of employment.

c. *Conclusions respecting 8(a)(5) allegations*

Respondent was from the onset of its operations in March obligated to recognize and bargain with the Union. Its failure to do so violates Section 8(a)(5) and (1) of the Act. Having failed to recognize and bargain with the Union respecting unit employee's terms and conditions of employment, Respondent could not change existing terms and conditions of employment, i.e., the contract terms in effect at the House of Honda at the time of closure. All changes in unit employees' terms and conditions, including the setting of initial terms different from those in place at House of Honda, which admittedly occurred without any recognition or bargaining with the Union, further violate Section 8(a)(5) and (1) of the Act.

5. Summary of unfair labor practice findings

Based primarily on demeanor, I credited the General Counsel's witnesses respecting the conduct alleged to violate Section 8(a)(1) of the Act. Based on those credibility resolutions, I found the conduct alleged in paragraphs 7 and 8 of the complaint, save for the allegations respecting Guay, Campbell's contact with alleged discriminatees limited to inquiries respecting reinstatement and Tallman's August telephone call with Parker, violated the Act. The General Counsel's allegations of violations of Section 8(a)(1) of the Act are therefore sustained save as noted.

I have sustained the General Counsel's prima facie case respecting the allegation that Respondent failed to hire 10 House of Honda unit employees in an illegal attempt to avoid becoming obligated to recognize and bargain with the Union. I have sustained Respondent's defense that Fuller would not have been hired under any circumstances by Respondent. I have rejected its defense with respect to the other nine individuals. Accordingly, I shall dismiss the complaint as to Fuller and sustain it as to the following individuals:

Adrien Abbadie	Troy Staat
Charles Bailey	Edward Tallman
Harlow Hill	Nathaniel Taylor
Peter Staat	Herman Troche
Ted Staat	

Respecting the allegations of violations of Section 8(a)(5) and (1) of the Act, I have sustained the General Counsel's allegations in their entirety. Thus, I found based on the authorities cited, supra, that Respondent made it ''perfectly clear'' it intended to hire the great majority of House of Honda's unit employees and, as a result of its illegal refusal to hire the nine named individuals listed above, constructively hired a majority of the predecessor's employees. Thus, Respondent was obligated from the setting of initial terms and conditions of employment to recognize and bargain with the Union. Its admitted failure to do so therefore violated Section 8(a)(5) and (1) of the Act as did each change in working conditions of unit employees made without bargaining with the Union including the setting of initial terms and conditions of employment different from those in place at the House of Honda prior to its close.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

With respect to the violations of Section 8(a)(3) and (5), I shall follow the teachings of *Fremont Ford*, 289 NLRB 1290, 1297–1298 (1988).

I shall order Respondent to offer the nine House of Honda unit employees listed below, in writing, immediate, full and unconditional employment in the unit positions for which they applied or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges they would have enjoyed if initially hired at the commencement of operations or at such time at non-House of Honda unit employees were hired in their stead, dismissing if necessary unit persons not earlier employed by the House of Honda, and to make them whole for any loss of earnings and benefits in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987). I shall further order Respondent to give all unit employees written notice that it will recognize and bargain with the Union as the exclusive representative of employees in the unit. I shall also order Respondent to remove from its records all references to its refusal to employ the nine unit applicants listed below

and notify each of them in writing that this has been done and the fact of their original nonhire will not be used against them in the future:

Adrien Abbadie	Troy Staat
Charles Bailey	Edward Tallman
Harlow Hill	Nathaniel Taylor
Peter Staat	Herman Troche
Ted Staat	

I shall order Respondent to recognize and, on request, bargain with the Union as the exclusive representative of all its employees in the unit. I shall also order Respondent to rescind, on the Union's request, the unilateral changes in unit employees' wages, hours, and terms and conditions of employment implemented in March 1990 and subsequently; and to make all affected unit employees whole for losses they incurred by virtue of its unilateral changes to their wages, fringe benefits, and other terms and conditions of employment in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), with interest as prescribed in *New Horizons for the Retarded*, supra. Respondent shall remit all payments it owes to the employee benefit funds and reimburse its employees in the manner set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), for any expenses resulting from Respondent's failure to make these payments. Any amounts that Respondent must pay into the benefit funds shall be determined in the manner set forth in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1970).

In view of the widespread and egregious nature of Respondent's conduct and at the request of the General Counsel, I shall also include a broad cease-and-desist order. See *Hickmont Foods*, 242 NLRB 1357 (1979).

Respondent argues for and the General Counsel opposes modification of the standard remedy in these cases because of the actions taken by Respondent in the course of the Federal district court litigation under Section 10(j) of the Act, described, supra. I shall defer consideration of the consequences of the court's orders and other actions taken by the parties in that context to the compliance stage of these proceedings. Respondent's arguments are thus preserved for presentation in that forum, if necessary.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by engaging in the following acts and conduct:

(a) Interrogated employment applicants respecting their union activities.

(b) Interrogated employee applicants about how they would vote in a union representation election.

(c) Interrogated employment applicants about whether they would work for a ''union shop.''

(d) Interrogated employment applicants about whether they had ''quit'' the Union.

(e) Told employee applicants that employees of the previous employer would not be hired so as to avoid incurring an obligation to recognize and bargain with the Union.

(f) Told employee applicants Respondent would not hire a majority or more than 50 percent of the predecessor employer's unit employees so as to avoid an obligation to recognize and bargain with the Union.

(g) Told employee applicants they must quit the Union before being hired by Respondent.

(h) Told employee applicants that Respondent was not going to allow the Union ''in.''

(i) Told employee applicants Respondent could trust them because they had ''quit'' the Union.

4. Respondent violated Section 8(a)(3) and (1) of the Act by failing and refusing to hire the following individuals in order to avoid an obligation to recognize and bargain with the Union as a successor employer:

Adrien Abbadie	Troy Staat
Charles Bailey	Edward Tallman
Harlow Hill	Nathaniel Taylor
Peter Staat	Herman Troche
Ted Staat	

5. At all times since before the commencement of Respondent's operations the Union has been the exclusive representative for purposes of collective bargaining of Respondent's employees in the following unit:

> All full-time and regular part-time employees employed in the Parts and Service Departments in the job classifications set forth in Article XVII of the ''Addendum Between the Greater East Bay New Car Dealers Association For And On Behalf of Southern Alameda County Dealers Association and East Bay Automotive Council,'' effective July 1, 1989 through June 30, 1993; excluding all other employees, guards, and supervisors as defined in the Act, as amended.

6. Commencing in March 1990 and continuing to date, Respondent violated Section 8(a)(5) and (1) of the Act by engaging in the following acts and conduct:

(a) Failing and refusing to recognize the Union as the exclusive representative of employees in the unit described above for purposes of collective bargaining.

(b) Failing and refusing to meet and bargain with the Union respecting the setting of terms and conditions of employment for unit employees.

(c) Unilaterally setting and changing terms and conditions of employment for unit employees without notifying the Union nor affording it an opportunity to bargain respecting such changes.

7. The above unfair labor practices constitute unfair labor practices effecting commerce within the meaning of Section 2(6) and (7) of the Act.

8. Except as specifically found above, Respondent has not violated the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Anthony Motor Company, Inc. d/b/a Honda of Hayward, Hayward, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employment applicants about their union activities and sympathies, whether they would work in a ''non-union shop'' or how they would vote in a union representation election.

(b) Interrogating employment applicants about whether they had ''quit'' the Union.

(c) Telling employee applicants they must quit the Union before being hired by Respondent and/or that Respondent could trust applicants who had quit the Union.

(d) Telling employee applicants that Respondent was not going to allow the Union ''in'' Respondent's store, telling employee applicants that employees of Respondent's predecessor would not be hired so as to avoid becoming obligated to recognize and bargain with the Union and telling employees that Respondent must avoid hiring more than 50 percent of the predecessor's unit employees to avoid becoming obligated to recognize and bargain with the Union.

(e) Failing and refusing to hire the below listed employees of the predecessor employer in order to avoid becoming obligated to recognize and bargain with the Union as representative of unit employees:

Adrien Abbadie	Troy Staat
Charles Bailey	Edward Tallman
Harlow Hill	Nathaniel Taylor
Peter Staat	Herman Troche
Ted Staat	

(f) Refusing to recognize and bargain in good faith with the Union as the exclusive representative of the employees in the bargaining unit set forth below by:

(i) Failing to recognize the Union as representative of unit employees.

(ii) Failing to meet and bargain with the Union respecting terms and conditions of employment for unit employees.

(iii) Unilaterally setting terms and conditions of employment for bargaining unit employees and thereafter unilaterally changing those terms.

(g) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer, in writing, to the extent it has not already done so, immediate and full reinstatement to all nine employees named below to the positions they held with the predecessor or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed while working for its predecessor, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, discharging if necessary the persons hired into bargaining unit positions who had not previously worked in the House of Honda bargaining unit. With reinstatement offers, Respondent shall notify these individuals that it will recognize and bargain with the Union as their exclusive representative.

Adrien Abbadie	Troy Staat
Charles Bailey	Edward Tallman
Harlow Hill	Nathaniel Taylor
Peter Staat	Herman Troche
Ted Staat	

(b) Remove from its files any reference to the unlawful refusal to hire the nine unit employees and notify these employees in writing that this has been done and that this unlawful conduct will not be used against them in any way.

(c) On request, bargain with the Union as the exclusive bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time employees employed in the Parts and Service Departments in the job classifications set forth in Article XVII of the ''Addendum Between the Greater East Bay New Car Dealers Association For And On Behalf of Southern Alameda County Dealers Association and East Bay Automotive Council,'' effective July 1, 1989 through June 30, 1993; excluding all other employees, guards, and supervisors as defined in the Act.

(d) On request of the Union, rescind the unilateral changes in the unit employees' wages, hours, and working conditions implemented in the hiring of unit employees in March 1990 and thereafter, and make affected employees, including those whose employment is directed above, whole for any and all losses they incurred by virtue of the unilateral changes to their wages, fringe benefits, and other terms and conditions of employment from the initial hire of unit employees in March 1990, until it negotiates in good faith with the Union to agreement or to impasse, in the manner set forth in the remedy section of the decision.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records and other records and documents necessary to analyze the amount of backpay and other monyes due under the terms of this Order and to ensure that this Order has been fully complied with.

(f) Post at its Hayward, California facility copies of the attached notice marked ''Appendix.''[11] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

The National Labor Relations Act holds that an employer who employs a majority of employees from a bargaining unit employed by the former employer whose operations the new employer takes over must recognize and bargain with the labor organization that represented the predecessor's unit employees.

The Act further holds that an employer may not refuse to hire a predecessor's employees because it wishes to avoid recognizing and bargaining with a labor organization.

When Anthony Motor Company, Inc. doing business as Honda of Hayward took over the operations of House of Honda in March 1990, it improperly failed to hire many of the unit employees of House of Honda. Had it hired those employees, a substantial majority of its employees in the unit described below would have come from the predecessor unit at House of Honda. Accordingly, Anthony Motors from the very beginning of its operations in March 1990 was obligated to recognize and bargain with the East Bay Automotive Council and its affiliated Local Unions: Machinists Automotive Trades District Lodge No. 190; East Bay Automotive Lodge 1546; Auto, Marine and Specialty Painters Union, Local No. 1176; and Teamsters Automotive Employees Union, Local No. 78, as the exclusive representative of unit employees.

Given all these facts, we give you the following assurances:

WE WILL NOT interrogate employment applicants about their union activities and sympathies, whether they would work in a ''non-union shop'' or how they would vote in a union representation election.

WE WILL NOT interrogate employment applicants about whether they had ''quit'' the Union.

WE WILL NOT tell employee applicants they must quit the Union before being hired by Respondent and/or that Respondent could trust applicants who had quit the Union.

WE WILL NOT tell employee applicants that Respondent was not going to allow the Union ''in'' Respondent's store, tell employee applicants that employees of Respondent's predecessor would not be hired so as to avoid becoming obligated to recognize and bargain with the Union or tell employees that Respondent must avoid hiring more than 50 percent of the predecessor's unit employees to avoid becoming obligated to recognize and bargain with the Union.

WE WILL NOT fail and refuse to hire employees of the predecessor employer, Jim Close Motors, d/b/a House of Honda, in order to avoid becoming obligated to recognize and bargain with the Union as representative of unit employees.

WE WILL NOT refuse to recognize and bargain in good faith with the Union as the exclusive representative of the employees in the bargaining unit set forth below.

WE WILL NOT unilaterally set terms and conditions of employment for bargaining unit employees and thereafter unilaterally changing those terms and conditions of employment without notifying the Union or providing it an opportunity to bargain respecting proposed changes.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees and/or employee applicants in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL offer, in writing, to the extent we have not already done so, immediate and full reinstatement to all nine employees named below to the positions they held with the predecessor or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed, while working for its predecessor, and WE WILL make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, discharging if necessary the persons hired into bargaining unit positions who had not previously worked in the House of Honda bargaining unit. WE WILL notify these individuals that we will recognize and bargain with the Union as their exclusive representative.

Adrien Abbadie	Troy Staat
Charles Bailey	Edward Tallman
Harlow Hill	Nathaniel Taylor
Peter Staat	Herman Troche
Ted Staat	

WE WILL remove from our files any reference to the unlawful refusal to hire the nine unit employees and WE WILL notify these employees in writing that this has been done and that this unlawful conduct will not be used against them in any way.

WE WILL, on request, bargain with the Union as the exclusive bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement. The appropriate bargaining unit is:

> All full-time and regular part-time employees employed in the Parts and Service Departments in the job classifications set forth in Article XVII of the ''Addendum Between the Greater East Bay New Car Dealers Association For And On Behalf of Southern Alameda County Dealers Association and East Bay Automotive Council,'' effective July 1, 1989 through June 30, 1993; excluding all other employees, guards, and supervisors as defined in the Act, as amended.

WE WILL, on request of the Union, rescind the unilateral changes in the unit employees' wages, hours, and working conditions that we implemented in the hiring of unit employees in March 1990 and thereafter, and make affected employees, including those whose employment is directed above, whole for any and all losses they incurred by virtue of the unilateral changes to their wages, fringe benefits, and other terms and conditions of employment from the initial hire of unit employees in March 1990, until we negotiate in good faith with the Union to agreement or to impasse, in the manner set forth in the remedy section of the decision.

WE WILL preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records and other records and documents necessary to analyze the amount of backpay and other moneys due under the terms of this Order and to ensure that the terms of this Order have been fully complied with.

ANTHONY MOTOR COMPANY, INC. D/B/A HONDA OF HAYWARD